

**ROBERT J. KELLER, P.C.**  
**Federal Telecommunications Law**  
**4200 Wisconsin Avenue, N.W. #106-233**  
**Washington, D.C. 20016-2157**

Telephone: 301.320.5355  
Facsimile 301.229.6875  
Email: [rjk@telcomlaw.com](mailto:rjk@telcomlaw.com)  
[www.his.com/~rjk/](http://www.his.com/~rjk/)

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Of Counsel:  
Shanis & Peltzman  
1901 L Street NW Ste 290  
Washington DC 20036  
Telephone: 202-293-0011

EX PARTE OR LATE FILED

March 13, 1998

Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W. - Room 222  
Washington, D.C. 20554

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MAR 13 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re: CC Docket No. 95-155

Dear Ms. Salas:

I herewith submit two copies of the attached letter for inclusion in the public filed for the above-referenced docket pursuant to Section 1.1206(b)(2) of the Commission's Rules and Regulations, 47 C.F.R. § 1.1206(b)(2).

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Very truly yours,



Robert J. Keller

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**ROBERT J. KELLER, P.C.**  
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**4200 Wisconsin Avenue, N.W. #106-233**  
**Washington, D.C. 20016-2157**

Telephone: 301.320.5355  
Facsimile 301.229.6875  
Email: [rjk@telcomlaw.com](mailto:rjk@telcomlaw.com)  
[www.his.com/~rjk/](http://www.his.com/~rjk/)

Of Counsel:  
Shanis & Peltzman  
Washington DC  
202-293-0011 ext. 200

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

A. Richard Metzger, Jr., Chief  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W. - Room 500  
Washington, D.C. 20554

In re: 877 Implementation  
CC Docket No. 95-155

Dear Mr. Metzger:

On behalf of two of my clients, ICB, Inc.<sup>1</sup> and ResponseTrak<sup>®</sup> Call Centers<sup>2</sup>, both active participants in CC Docket No. 95-155, I am writing this letter in response to the letter, submitted to you yesterday, Thursday, March 12, 1998, by Don Werner Liaison to the FCC on behalf of the Ordering and Billing Forum's ("OBF") SMS Number Administration Committee ("SNAC"). ResponseTrak recently filed a pleading asking that the Commission defer the scheduled April 5, 1998 implementation date pending resolution of the so-called "vanity number" issue.<sup>3</sup>

Mr. Werner offered several objections to any delay in the implementation date. My clients offer the following response and once again urge you to stay the 877 rollout until fundamental issues in this rulemaking proceeding are resolved. In accordance with Section 1.1206(b)(1) of the Commission's Rules and Regulations, 47 C.F.R. § 1.1206(b)(2), two copies of this letter are being provided to the Office of the Secretary for inclusion in the public file for CC Docket No. 95-155.

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<sup>1</sup> ICB, under the trade name ICB Toll Free Consultancy, is a consulting firm representing numerous toll free service users, such as telemarketers, calling centers and bureaus, shared use vendors, bundled service providers, etc. ICB's consulting clients also include several corporate marketers that are not otherwise involved in the telecommunications industry (i.e., pure end users of toll free services). ICB is very active in the toll free industry as a participant in the Alliance for Telecommunications Industry Solutions, Inc. ("ATIS"), and is one of the few active participants in SNAC that is neither a carrier nor a RespOrg. ICB publishes *ICB Toll Free News*, the leading trade publication on toll free issues, options, and alternatives for telecommunications and marketing executives. ICB thus has a unique perspective on and knowledge of the issues in this proceeding.

<sup>2</sup> ResponseTrak is a division of New England 800 Company, a corporation headquartered in Waldoboro, Maine. The Company is a Maine-based developer and provider of custom call center services and systems. With a staff of over 125 persons, the company provides inbound call center services to more than 30 clients, 24 hours a day, seven days a week. The company's call centers receive and process over 500,000 transactions annually, and is growing at a rate which will soon double that volume.

<sup>3</sup> *Written Ex Parte Presentation and Motion to Defer 877 Implementation* submitted on February 24, 1998.

Mr. Werner writes:

"SNAC has completed its activities related to 877 rollout and the events of April 4 and 5, 1998, which are central to the rollout. In a conference call on February 17, 1998, SNAC came to consensus to open the 877 Easily Recognized Codes (ERC) at 12:00 noon CDT, April 5, 1998.

This should provide sufficient time to complete the SMT (SMS/800 Management Team) identified system activities necessary to open 877 NPA. At this time, all codes will be available to all RespOrgs."

My clients question the accuracy of these assertions. Under policies adopted in the *Second Report and Order*, new and smaller RespOrgs are entitled to reserve a minimum 7.5% of the RespOrgs working toll free numbers but no fewer than 2,000 numbers. 12 FCC Rcd 11162 at ¶ 78 (1997). We understand that the SMT recently advised SNAC that the infrastructure necessary to meet this requirement was still a couple months away. Moreover, there is a database access problem particularly disadvantageous for smaller RespOrgs. Specifically, there are approximately 4,500 users of the SMS database<sup>4</sup>, but only 244 one-to-one modem ports allotted for exclusive dial-up access. Clearly, the majority of dial-up users during a peak time will be blocked from access. Most of the larger RespOrgs will not be affected by this insofar as they have dedicated links giving them direct access to the database. Thus, the SMS may be ready to accommodate the needs of the large RespOrg/carriers, but it is apparently not prepared to accommodate *all* RespOrgs, including small entities, on a nondiscriminatory basis.

Mr. Werner further writes:

"Any significant delay to the general availability of 877 could result in the total exhaustion of the 800/888 toll free resource. All SNAC participants have expressed concerns regarding impact on individual company marketing plans and work center activities that are already in progress and/or scheduled.

"Mass changes (NPA Splits and Conversions) in SMS/800 have been re-scheduled to facilitate the three-week window surrounding 877 general availability. Based on the current schedule for these types of activities, the next available three-week window will begin June 21, 1998. Based on the current projections, exhaust of the resource may have already occurred."

There is substantial reason to question the veracity of these statements. The "projections" used by SNAC assume number growth<sup>5</sup> at the rate of 88,768 per week.<sup>6</sup> The actual number growth since mid-October of 1997, however, has never been anywhere near that figure. The average weekly number growth for the period from October 11, 1997 to February 28, 1998, has been only 48,202. As of February 28, 1998, the total spare pool of numbers stood at 1,295,079. Projecting forward based on that actual, historical data, if 877 implementation were delayed sixty days, to June 6, 1998, there will still be over 620,000 numbers in the total spare pool.

These projections and concerns must, moreover, be balanced against the important public interest issues involved. This proceeding has been underway for nearly two-and-one-half years, and the Commission still has not resolved the important issue of how to protect the legitimate commercial interest that business users have in toll free number recognition when new SACs are opened. Nevertheless, more than two years ago the Commission proceeded with 888 implementation with nothing more than an eleventh hour, under-publicized, and haphazardly executed set-aside scheme.

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<sup>4</sup> There are approximately 240 registered RespOrgs, most of them with simultaneous multiple-user access.

<sup>5</sup> Number growth is the net of new numbers reserved by RespOrgs and old numbers returned to the pool.

<sup>6</sup> SNAC's current projections are available at: <ftp://ftp.atis.org/pub/clc/obf/snac/constat.xls>

Now we are on the eve of 877 implementation, and SNAC is urging the Commission to proceed with 877 implementation with no protection scheme at all in place. It is extremely disturbing to my clients, and many others like them with whom I have communicated, that while there is distress that 877 implementation may be delayed, there appears to be no concern whatsoever that basic, fundamental, and important policy decisions related to the opening of toll free SACs are ignored indefinitely. There is little point to a rulemaking to establish policies for the opening of toll free SACs if the Commission continues to allow new SACs to be implemented before those policies are established!

Mr. Werner continues:

"If a decision is made to grant the right-of-first-refusal on 888 set-aside numbers, then the implementation of this decision should be delayed for at least sixty (60) days after the 877 implementation. The delay is requested due to 877 demand and obvious system implications. In addition, 888 replication release processes have yet to be developed to facilitate activities between subscribers and RespOrgs and between RespOrgs and the SMS database administrator."

It is our understanding that an 888 set-aside release process is already in place. If this is so, Mr. Werner is either mistaken or is attempting to confuse the issues. But this is, in any event, a red herring. The 888 replication release is not an immediate issue. The matter before us now is 877 implementation, and whether the Commission is going to allow 877 implementation to go forward without first protecting against the adverse effect on existing toll free users. We do find it interesting, however, that SNAC was more than willing to see the 888 set-aside scheme rushed into place virtually over night, but now prudently requests a 60 day advance notice for 888 replication release. The 888 set-aside scheme was poorly communicated by RespOrgs to their subscribers, indeed, many 800 number users never knew they had a set-aside right until it was too late.

Finally, Mr. Werner states:

"If the decision were made to grant the right-of-first-refusal for 877 numbers, individual companies would need sufficient time to develop a communication plan to educate their end user subscribers. This would force a delay of 877 and create a greater potential for complete exhaust of the resource."

SNAC is essentially arguing here against any sort of protection plan for existing 800/888 users with respect to the 877 SAC. But the Commission must realize that SNAC is dominated by large carrier/RespOrgs. These companies have access to the database, many of them have access that is far superior to that of smaller RespOrgs. The large RespOrg/carriers thus have the ability to "self-replicate" with 877 numbers to protect themselves and their largest accounts, so it is quite easy for them to dismiss the concept of any sort of protection for small business.

The Commission has never yet faced the reality that the current toll free number administration system is inherently anticompetitive. The large RespOrg/carriers have an obvious conflict of interest which the Commission can no longer ignore. Average business users do not have access to the toll free number database; they must rely on a RespOrg for that access. Even those smaller carriers and other businesses who themselves become RespOrgs are not on an equal footing with the giant long distance carriers who have sophisticated computer equipment and direct access to the database. The large RespOrg/carriers have a decidedly unfair advantage when it comes to number allocation.

The large RespOrgs are not merely carriers, they are also consumers of numbers themselves. They use numbers for their own communications and non-communications business ventures, and they also use their superior access to desirable numbers to entice large, lucrative long distance accounts. The small business user, meanwhile, has to wait at the back of the line and merely hope that the numbers it wants are perhaps among the spoils left behind by the big boys. Under current FCC prohibitions on "brokering" numbers, moreover, the injury to small business users is permanent and irreparable. The rush to 877 implementation without first resolving replication

issues will first deprive them of the ability to protect their numbers in the initial allocation process, and then the Commission's anti-brokering policy precludes them from correcting the damage in the after-market.

The significance and anticompetitive effect of the conflict of interest of large RespOrgs/carriers can not be overemphasized. Consider the various hats worn by an AT&T, Sprint, or MCI in connection with the allocation and administration of toll free numbers. Each is:

- a SNAC member, having a substantial role in structuring the system and advising the Commission;
- a telecommunications carrier, expected to meet the communications needs of *all* subscribers on a nondiscriminatory basis;
- a RespOrg, with unique access to an "essential resource" (*i.e.*, numbers) needed by its subscribers;
- a user of numbers, placing it in direct competition with its subscribers for this essential resource;
- often a competitor with its subscribers' business ventures (*e.g.*, call centers, credit cards, etc.); and
- a judge and jury on alleged number abuse, having been charged by the Commission with enforcing anti-hoarding regulations.

It is impossible for an entity to equitably play these competing roles on a truly unbiased and nondiscriminatory basis. Even in the absence of anticompetitive or discriminatory intent on the part of the large RespOrg carrier, the system itself inevitably dictates that the small business user will not get a fair shake. This is not an equitable system, this is not a pro-competitive system, this is not a system conducive to small business, and this may not even be a legal system.

With the anticompetitive advantage of its controlling members well ensconced, SNAC now comes forward and tells the Commission that there is not time to worry about protecting existing 800/888 users against duplication at 877. Taken at its word, SNAC can only be saying one of two things. SNAC may be saying that the public interest does not require protecting existing 800/888 business users from having their numbers duplicated by others in the 877 SAC. Or, SNAC's position may be that any 877 duplication concerns are outweighed by the need for immediate 877 implementation. SNAC must also agree, therefore, that its members have not need to protect their own 800/888 numbers or that any such need is outweighed by the more immediate need for 877 implementation. In other words there is no compelling need for AT&T to obtain or protect "877-CALL ATT," or for MCI to obtain or protect "877-COLLECT," for Sprint to obtain or protect "877-PIN DROP," etc. Yet there is no one in this industry, and probably no one among the regulators, who believes for a moment that these will not be among the first numbers reserved by the large carrier/RespOrgs for themselves. But SNAC is all too willing to deny the same protection rights to the smaller businesses that do not have superior access to and control over number allocation.

If the Commission accepts the SNAC position, it should allow the 877 SAC to open only subject to the following condition:

For 18 months following the opening of the 877 SAC, no RespOrg may reserve or hold for its own account, for the account of any entity affiliated with it, or for the account of any of its subscribers, an 877 number for which that RespOrg, affiliate, or subscriber holds or has in set-aside the 800 or 888 replica.

This is the minimum that is necessary to put small business toll free users on a level playing field. A more prudent approach, however, would be to defer the 877 opening and expedite consideration of the important, unresolved issues. In its February 24, 1998 written ex parte filing, ResponseTrak offers a solution to these knotty problems that is equitable, efficient, and effective. We urge the Commission to carefully evaluate that proposal before irrevocably scrambling more eggs.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Very truly yours,



Robert J. Keller  
Counsel for ICB, Inc. and ResponseTrak Call Centers

cc: OBF/SNAC

Don Werner, OBF/SNAC Liaison to FCC (fax 610-837-0799)  
Susan Miller, ATIS Vice President (fax 202-393-5481)

Commissioners' Offices

Kevin Martin, Advisor to Commissioner Furchtgott-Roth  
Kyle D. Dixon, Advisor to Commissioner Powell  
James Casserly, Advisor to Commissioner Ness  
Tom Powers, Advisor to Chairman Kennard  
Paul Gallant, Advisor to Commissioner Trisanti

Common Carrier Bureau

Mary Beth Richards, Acting Deputy Bureau Chief  
Les Selzer, Chief Economist, Common Carrier Bureau  
Geraldine Matisse, Chief, Network Services Division, Common Carrier Bureau  
Anna Gomez, Deputy Chief, Network Services Division  
Judith Albert, Esq., Network Services Division, Common Carrier Bureau  
Robin Smolen, Staff Attorney, Network Services Division

Small Business Administration

S. Jenell Trigg, Asst. Chief Counsel - Telecommunications, Office of Advocacy (fax 202-205-6928)